Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling that	)	WC Docket No. 02-361
AT&T's Phone-to-Phone IP Telephony	)	
Services Are Exempt from Access Charges	)	

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Sharon J. Devine
Robert B. McKenna
Kristin L. Smith
1020 19th Street, N.W.
Washington, DC 20036
303.672.2820

Attorneys for

QWEST COMMUNICATIONS
INTERNATIONAL INC.

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Qwest Communications International Inc. ("Qwest") respectfully submits these comments opposing the Petition of AT&T Corp. ("AT&T") for Declaratory Ruling that AT&T's Phone-to-Phone IP [Internet protocol] Telephony Services are Exempt from Access Charges.[1] The phone-to-phone telephony as described in the Petition falls squarely within the statutory definition of telecommunications service and has the characteristics of classic common carriage. There is no question that phone-to-phone IP telephony services are subject to carriers' carrier charges[2] for utilizing local exchange switching facilities for the origination and termination of calls regardless of the technology employed. The Petition should be denied.

INTRODUCTION AND SUMMARY

On October 18, 2002, AT&T filed its Petition requesting that the Federal Communications Commission ("Commission") issue a declaratory ruling that would prohibit the assessment of carriers' carrier charges on phone-to-phone IP telephony services unless and until the Commission determines the appropriate access charges for such services. In response to the

[1] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, filed Oct. 18, 2002 ("Petition").

[2] The term "access charges" applies to all charges assessed for access to a local exchange carrier's ("LEC") facilities. AT&T's Petition actually addresses what are called "carriers' carrier charges", which are charged to providers of telecommunications service that access local exchange switching facilities. *See* 47 C.F.R. § 69.5(b). Carriers' carrier charges are generally described in 47 C.F.R. §§ 69.106-113.

Commission's request for comments, Qwest submits these comments to urge the Commission to affirm its existing rules, which require the application of carriers' carrier charges to all phone-to-phone telephony services, including those with an IP component. The Commission should consequently deny AT&T's request to overhaul the existing rules in the context of a declaratory ruling proceeding. The Commission should address further issues of phone-to-phone IP voice telephony in its ongoing intercarrier compensation proceeding.[3]

At issue in this proceeding is whether carriers' carrier charges apply to the phone-to-phone IP telephony service outlined in AT&T's Petition -- that is, whether those services are properly defined as telecommunications services under the Act. The phone-to-phone IP telephony services described by AT&T satisfy the long-standing, classic definition of a basic telecommunications service. The transmission in the phone-to-phone telephony service described in AT&T's Petition connects to the ILECs' networks at both ends of the AT&T network utilizing circuit-switched protocols, while the transmission originates and terminates at the premises of the calling and called parties in analog format. In fact, to the customer, this phone-to-phone telephony service appears identical to traditional circuit-switched voice services. Accordingly carriers' carrier charges are assessed on providers of interstate telecommunications services that use local exchange switching facilities to originate or terminate interstate telecommunications.

In contrast, AT&T apparently claims that the fact that the IP protocol is used as a vehicle within its own network to support its long distance service between the LECs' networks makes the phone-to-phone IP telephony service an information service.[4] Information services are not

[3] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, *Notice of Proposed Rulemaking*, 16 FCC Rcd. 9610 (2001).

[4] *See* Qwest Exhibit A as attached.

telecommunications services, and, interstate information service providers may access the local exchange facilities of the LEC on the same basis as an end user via local exchange services. Not only has the Commission expressly distinguished phone-to-phone IP telephony, as described by AT&T, from information services that permit users some voice capability,[5] but phone-to-phone IP telephony service cannot qualify as an information service even under the broadest reading of the Commission's information services definition.[6] AT&T's Petition provides no reasoned analysis that shows cause for the Commission to revise its interpretation of the statutory categorizations. Accordingly, AT&T is not entitled to purchase local exchange access at local rates for its phone-to-phone telephony service, but instead must pay the appropriate switched access charges. Furthermore, when AT&T terminates or originates phone-to-phone IP telephony calls through a competitive local exchange carrier ("CLEC") to an incumbent LEC, the proper compensation is based upon charges for jointly-provided access and not reciprocal compensation.

Moreover, from a public policy perspective, the Commission should reject AT&T's Petition as well. AT&T's Petition, if granted, would violate the fundamental principle of technological neutrality by securing an exchange access discount based solely on the type of interexchange technology employed. Granting to the providers of phone-to-phone IP telephony services a discount in access charges not available to other providers of phone-to-phone telephony services would also artificially discriminate between technologies in violation of the fundamental principles of the 1996 Act that the market, not the regulator, should ultimately determine the optimal telecommunications technology to be deployed. This discrimination

[5] *In the Matter of Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd. 11501, 11541-45 ¶¶ 84-91 (1998) ("*Universal Service Report*").

between technologies, in turn, harms consumers of the service being provisioned over the various technologies by creating an artificial disparity in the offerings associated with those technologies.

Because the rules are clear, U S WEST filed a petition on April 5, 1999 requesting a declaratory ruling to the effect that providers of phone-to-phone IP telephony services are required to pay carriers' carrier charges -- essentially the converse of the AT&T Petition. The U S WEST petition was withdrawn by Qwest after its merger with U S WEST prior to the Commission releasing it for public comment. AT&T claims that the Commission's failure to seek public comment on the petition prior to its being withdrawn is tantamount to an affirmative determination by the Commission on its merits under the Administrative Procedure Act.[7] This argument is clearly frivolous. However, the fact that the U S WEST petition made sense in clarifying existing rules does not mean that AT&T's Petition is procedurally proper. A declaratory ruling proceeding is not a proper vehicle to overturn existing precedent. Any such overhaul would require the complete record of a rulemaking. Indeed, the Commission has an open proceeding on intercarrier compensation in which issues related to compensation for phone-to-phone IP voice telephony can be logically addressed.

The U S WEST petition and its subsequent disposition by Qwest also points out something else of consequence. When U S WEST filed its petition, it perceived that the primary provider of phone-to-phone IP telephony services was the pre-merger Qwest. Today, Qwest (including the former U S WEST and Qwest entities) analyzes and evaluates the proper application of access charges from multiple perspectives, as an ILEC that seeks to be

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[6] 47 U.S.C. § 153(20); 47 U.S.C. § 153(43),(46); *Universal Service Report*, 13 FCC Rcd. at 11512-13 ¶ 24.

[7] AT&T Petition at 4, 16-17.

compensated for the provision of its interstate access, as a major provider of long distance services that uses the IP protocol for transmission purposes, as a CLEC and as a provider of information services. It is Qwest's conclusion that the analysis represented herein is the best overall position from the perspective of the entire industry, not just from the viewpoint of an ILEC or an interexchange carrier ("IXC"). Accordingly, Qwest urges the Commission to deny AT&T's Petition, and in turn, affirm its existing rules and conclude that the phone-to-phone IP telephony service described in the Petition is a telecommunications service subject to carriers' carrier charges.

I. THE COMMISSION'S RULES REQUIRE PROVIDERS OF PHONE-TO-PHONE IP TELEPHONY SERVICE TO PAY THE SAME RATES FOR ACCESS TO LOCAL EXCHANGE SWITCHING FACILITIES AS ARE PAID BY ALL OTHER PROVIDERS OF TELECOMMUNICATIONS SERVICES

Phone-to-phone telephony services with an IP component, as illustrated in AT&T's Petition, are subject to the carriers' carrier charges paid by all telecommunications service providers when making use of the local exchange switching facilities provided for interstate service. AT&T defines phone-to-phone IP telephony service as the interexchange carriage of traditional voice calls originated and terminated through local exchange switching facilities in the traditional circuit switching protocol, but utilizing IP protocol to support the transmission of its long distance service over the public Internet or over its own backbone. Based on the use of this IP component, AT&T requests a declaratory ruling to the effect that what it calls "phone-to-phone IP telephony" is an information service. However, the service cannot be an information service under the Commission's rules: 1) The service is a telecommunications service as defined in the Act; 2) The originating and terminating LECs receive and deliver the voice messages from and to AT&T in circuit-switched protocol, without any change to the message sent by the end-user customer; and 3) The service is neither distinguished in its offering by AT&T, nor distinguishable by the customers, from traditional long distance services. Accordingly, despite AT&T's assertions to the contrary, AT&T's phone-to-phone IP telephony service is a telecommunications service subject to payment of carriers' carrier charges for access to local exchange switching facilities in the provision of interstate service.

A. The Phone-to-Phone IP Voice Telephony Service Offered by AT&T is a Telecommunications Service

Phone-to-phone telephony service, including phone-to-phone IP telephony, offered directly to the public is properly classified as a telecommunications service, regardless of the underlying technology used to support it. Phone-to-phone IP telephony service provides the end-user customer with the capability to transmit voice communications between points specified by that user, without change in the form or content of the information sent and received. The provision of such capability constitutes the provision of telecommunications.[8] This service is offered "directly to the public for a fee." Such an offering constitutes the provision of a telecommunications service.[9] Indeed, the Commission has explained that "[i]f the end user can receive nothing more than pure transmission, the service is a telecommunications service."[10] As a provider of telecommunications service, the phone-to-phone IP voice telephony provider is properly classified under the Act as a "telecommunications carrier."[11]

The Commission has recognized the fact that there does not seem to be any principled method of removing phone-to-phone IP telephony service from the definition of telecommunications service in the Act. In the *Universal Service Report*, the Commission explained that phone-to-phone IP telephony services seemed to "bear the characteristics of

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[8] 47 U.S.C. § 153(43).

[9] 47 U.S.C. § 153(46).

[10] *Universal Service Report*, 13 FCC Rcd. at 11530 ¶ 59

'telecommunications services,'"[12] and that this is true because a phone-to-phone IP telephony service provider merely deploys "a gateway within the network to enable phone-to-phone service" creating "a virtual transmission path between points on the public switched telephone network over a packet-switched IP network".[13] Thus, "[f]rom a functional standpoint, users of these [phone-to-phone IP telephony] services obtain only voice transmission."[14] Phone-to-phone IP telephony service is simply modern technology applied to long distance voice service. It is properly classified as a telecommunications service.[15]

B. AT&T's use of the Public Internet as One Component for its Telecommunications Service Does Not Alter the Classification of Phone-to-Phone IP Telephony Service as a Telecommunications Service

A theme that runs through the AT&T Petition is the hint that any decision that treats phone-to-phone IP telephony providers as telecommunications service providers would be tantamount to regulation of the "public Internet" itself.[16] Because there is universal support for the conclusion that the public Internet has flourished best in a deregulated environment, any Commission decision that had the effect of regulating the Internet would be certain to be controversial. Proper classification of phone-to-phone IP telephony service will not jeopardize the deregulated status of the public Internet.

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[11] 47 U.S.C. § 153(44).

[12] *Universal Service Report,* 13 FCC Rcd. at 11541 ¶ 83, 11550 ¶ 101, 11552 ¶ 105.

[13] *Id.* at 11543-44 ¶ 89.

[14] *Id.*

[15] As is noted below, even if it were true that protocol processing in a voice service changed the underlying character and classification of this service, AT&T's service contains no net protocol conversion and still would not be an information service.

[16] AT&T Petition at 2, 5-6, 25.

The fact that AT&T offers a telecommunications service over facilities that are not themselves regulated as telecommunications services does not change the nature of AT&T's service. AT&T's telecommunications service is defined by the public nature of the offering. AT&T markets and offers its phone-to-phone IP telephony service directly to the public as long distance voice service. The nature of the AT&T phone-to-phone IP voice telephony service, as marketed and offered by AT&T, is that of a telecommunications service. Phone-to-phone IP telephony service is indistinguishable from and interchangeable with all other voice telephony service offered by any common carrier, including AT&T. In addition, the facilities employed in the transmission of the service do not negate the proper classification of the service, since a single delivery vehicle can support both regulated and deregulated services, even if offered by the same provider.[17] Accordingly, the classification of AT&T's phone-to-phone IP telephony service as a telecommunications service is absolutely irrelevant to the regulatory status of the public Internet.

C. From the Perspective of the End-User Customer, Phone-to-Phone IP Telephony Service is Identical to Other Voice Telephony Technologies

The Commission customarily relies on the perception of the end-user customer in determining the proper classification of an offering as a telecommunications service.[18] "The classification of a service under the 1996 Act depends on the functional nature of the end-user offering."[19] As the Commission has so stated with respect to phone-to-phone IP telephony

[17] *Wold Communications v. FCC*, 735 F.2d 1465, 1474-86 (D.C. Cir. 1984).

[18] *Universal Service Report*, 13 FCC Rcd. at 11543 ¶ 86.

[19] *Id*.

providers: "[i]ndeed, from the end-user perspective, these types of phone-to-phone IP telephony service providers seem virtually identical to traditional circuit-switched carriers."[20]

The end user of the phone-to-phone IP telephony service described in AT&T's Petition would not be able to decipher whether or not the call traveled across a network utilizing IP protocol or traveled solely across a network employing only circuit-switch technology. First, the phone-to-phone IP telephony provider holds itself out as providing voice telephony services and does not distinguish whether the service is provided entirely over a circuit-switched network, or whether one component of the traffic is converted into and out of IP protocol during transmission.[21] Second, the phone-to-phone IP telephony service does not require the customer to use different customer premises equipment ("CPE") for the service than necessary to place any other ordinary telephone call (or facsimile transmission) over the public switched telephone network.[22] Third, the phone-to-phone IP telephony service allows the end user to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements, as well as to receive calls using such telephone numbers.[23] Fourth, the phone-to-phone IP telephony service transmits the information from the end user -- in this case the customer's voice -- without net change in form or content.[24] Thus, from the customer's perspective, the phone-to-phone IP telephony service described by AT&T is the same as the traditional long distance voice service that the customer has used for years.

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[20] *Id.* at 11550 ¶ 101.

[21] *Id.* at 11543-44 ¶ 88.

[22] *Id.*

[23] *Id.*

[24] *Id.*

Since circuit-switched networks cannot support the enhancement or integration capabilities normally associated with IP telephony, the phone-to-phone IP telephony services consequently offer no additional enhanced features or integration, such as generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information about the call. According to the Commission, "users of certain forms of phone-to-phone IP telephony appear to pay fees for the sole purpose of obtaining transmission of information without change in form or content."[25] AT&T's phone-to-phone IP telephony service is identical to traditional circuit-switched voice services, except for that component of the transmission which happens to utilize IP protocol. The mere use of IP technology to carry voice over a portion of the IXC's network in a way that is not controlled by and, indeed, not even apparent to end-user customers is not an information service, but a telecommunications service.

D. The Phone-to-Phone IP Telephony Service Offered by AT&T Fails to Meet the Expansive Definition of an Information Service

Qwest submits that this offering of voice telephony service directly to the public is a telecommunications service regardless of technology. The premise of AT&T's basic argument is that, because phone-to-phone IP telephony service uses the IP protocol for transport, the service is an information service under the Telecommunications Act and entitled to end-user access to local exchange switching facilities under the so-called "ESP exemption."[26] Even applying the most liberal definition of information services, phone-to-phone IP voice telephony service is a basic telecommunications service because there is no net change in any aspect of the information as received and transmitted between end-user customers. The only code or protocol

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[25] *Id.* at 11550 ¶ 101.

[26] The Enhanced Service Provider ("ESP") exemption permits providers of enhanced services to access local exchange services "as if" they were end users, notwithstanding the fact that they often are providing interexchange, interstate services.

modifications that occur in the service are implemented solely to facilitate transmission and are reversed prior to delivery.

In contrast to the Commission's definition of "basic services," which constitutes pure transmission capability, "enhanced services" are defined as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of a subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information."[27] The Commission created the definitional classification to distinguish between services in order to ensure that common carrier regulations applied appropriately to common carrier services while creating the ESP exemption.

Among other things, the ESP exemption permits providers of interstate information services to purchase interstate access at local business rates.[28] Because information services are not common carrier services, the Commission has determined that providers of information/enhanced services should be treated as end users for purposes of payment of switched access charges. AT&T requests that its phone-to-phone IP telephony service be treated as an end-user service for access charges purposes. Even if the rules applicable to enhanced services applied to phone-to-phone telephony service, AT&T's service would not be an enhanced service and AT&T would not be entitled to purchase local exchange access at local business rates.

[27] 47 C.F.R. § 64.702(a).

[28] For a discussion of the origin and effect of the ESP exemption, *see Southwestern Bell Telephone Company v. FCC*, 153 F.3d 523, 541-544 (8th Cir. 1998).

Information services and enhanced services are synonymous for purposes of the ESP exemption. Phone-to-phone telephony using an IP component cannot be deemed an enhanced service or an information service.[29] The Commission has explained that "[i]f the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service."[30] Specifically, the Commission's rules provide that one of the characteristics that distinguishes an information service from a telecommunications service is the occurrence of a net conversion between the two ends of the common carrier transmission of the "format, content, code, protocol" or similar aspects of the message.[31] In application of these distinctions, the Commission concluded that "[f]rom a functional standpoint, users of these [phone-to-phone IP telephony] services obtain only voice transmission, rather than information services such as access to stored files."[32]

When a customer initiates a phone-to-phone telephony call with an IP component, as described in AT&T's Petition, the voice message begins from the calling party's telephone and travels across the ILECs' local exchange facilities to the ILECs' tandem switch. From the ILECs' switch the message is transmitted onto the IXC's network, where the message is translated into the IP protocol compatible with the public Internet or IXC's backbone. Once the message traverses the public Internet or the IXC's backbone, the message is translated back into

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[29] AT&T, rather cryptically, claims that it offers as an enhanced service a prepaid calling card that includes advertising announcements. Petition at 19. While a prepaid calling card is a billing service and does not constitute a common carrier service, whether or not an advertisement is added, the classification of the underlying common carrier service (*i.e.* transmission of the call) remains the same no matter how it is paid for. Adding an announcement to the provision of a common carrier long distance service would not exempt the carrier from payment of carrier's carrier charges.

[30] *Universal Service Report*, 13 FCC Rcd. at 11530 ¶ 59.

[31] 47 C.F.R. § 64.702(a).

[32] *Universal Service Report*, 13 FCC Rcd. at 11544 ¶ 89.

a circuit-switched format and is sent to the terminating LECs' network. The terminating LEC then forwards the message along its local exchange facilities to the called party. The protocol conversions involved with such messages are further illustrated in the diagram attached to these comments as Qwest's Exhibit A.[33] While a phone-to-phone IP telephony call requires conversions from a circuit-switched protocol to IP, the conversions are reversed and the service fails to satisfy the net conversion requirement.

Moreover, the Commission has explicitly clarified that certain internetworking protocol conversion capabilities -- those conversions taking place "that result in no net conversion between users" -- are frequently required in the provisioning of a telecommunications service.[34] Specifically, the Commission noted that "if information enters a carrier's network on protocol 'A', it must exit the network on the same protocol, even though within the network it could be converted to 'x', 'y' or 'z' protocols", however "the result of the common carrier offering is not a change in protocol."[35] The illustration in Exhibit A demonstrates clearly how the phone-to-phone call is translated from circuit-switched protocol to IP and back without any net conversion.

Finally, the Commission established an exception to the "net conversion" application to account for new technology. Where different interfaces are necessary to facilitate the introduction of new technology, an end-to-end transmission service that includes protocol or

[33] Use of the public Internet by the IXC does not damage this analysis. In such cases the IXC is simply using the public Internet as the facility over which it provides its telecommunications service.

[34] *IDCMA MO&O*, 10 FCC Rcd. at 13719 ¶ 16; *see also Computer III Decision*, 2 FCC Rcd. at 3082 ¶ 71.

[35] *Computer II Inquiry on Reconsideration*, 84 FCC 2d at 60 ¶ 26.

code conversions may still be considered to be a basic telecommunications service.[36] In particular, the Commission introduced the concept of permitting basic classification of protocol conversions for new technologies "to cover those instances in which '[basic network] technology is introduced piecemeal, and appropriate conversion equipment is used within the network to maintain compatibility [between user equipment and the network].'"[37] Under this provision, IP-related conversions, which permitted a network to implement multiple interfaces during the development of phone-to-phone IP telephony, would still constitute a basic telecommunications service in their entirety.

In application of this definitional classification for information service, the Commission has explained that phone-to-phone IP telephony services seem to "lack the characteristics that would render them 'information services' within the meaning of the statute."[38] Without a net conversion of code, protocol, content or format in the messaging sent in the provisioning of phone-to-phone telephony with an IP component, phone-to-phone IP telephony would not comport with the definition of information service.

E. The Commission's Rules Clearly Specify the Means by which Telecommunications Services such as Phone-to-Phone IP Voice Telephony Service Must Access Local Exchange Switching Facilities for the Provision of Interstate Services

Because phone-to-phone IP telephony providers offer this service as a telecommunications service, they generally access their customers through local exchange switching facilities of a LEC. AT&T's Petition, however, is predicated on the false premise that the current Commission rules do not permit LECs to assess carriers' carrier charges on entities

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[36] *Computer III Decision*, 2 FCC Rcd. at 3082 ¶ 70.

[37] *Id.*

[38] *Universal Service Report*, 13 FCC Rcd. at 11541 ¶ 83, 11550 ¶ 101, 11552 ¶ 105.

that use local exchange switching facilities to originate or terminate interstate phone-to-phone IP telephony services. In fact, AT&T makes the unsubstantiated claim that the Commission has established "*de jure* and *de facto* exemptions of phone-to-phone IP telephony from access charges" that AT&T has specifically relied on in investing in its IP network.[39] As discussed above, phone-to-phone IP telephony services are comprised of interstate voice services offered on a common carrier basis to the public.[40] The rules applicable to such services are very simple and of long-standing application. AT&T must comply with them unless and until the Commission determines otherwise.

First, as even AT&T seems to admit, the ESP exemption does not permit an ESP to purchase tariffed services at an off-tariff discount. When a customer purchases a Feature Group trunk for sending or receiving an interstate communication, it must pay the tariffed rate for that service no matter what the regulatory classification of that customer. The so-called ESP exemption permits actual providers of information services to purchase interstate exchange access at local business rates pursuant to the LEC's local exchange tariff. It does not permit them to purchase an interstate tariffed service at anything other than the tariffed rate. If an information service provider purchases Feature Group D from a LEC, it must pay the proper Feature Group D rates.

Similarly, there seems to be no dispute that providers of phone-to-phone IP telephony services should not be assessed carriers' carrier charges when they do not utilize LEC local exchange switching facilities. For example, if a phone-to-phone IP telephony call were terminated or originated via a private line (or a DSL connection) that bypassed the LEC's local

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[39] AT&T Petition at 18. If this is true, AT&T was imprudent in its assumptions and reliance.

exchange switching facilities, the phone-to-phone IP telephony provider would pay the tariffed rate for the access purchased, without being assessed additional charges. This is true for any carrier -- one pays the tariffed rate only for the services ordered. The proper charge would be assessed based on the tariff from which the service was ordered.

In this proceeding, the Commission should reaffirm that a phone-to-phone IP telephony provider cannot obtain interstate access and pay for it as if it were an end user making a local call. If the phone-to-phone IP telephony provider is actually using a line side connection (rather than a Feature Group D trunk) for access to the exchange, it still must purchase that line out of the ILEC's interstate access tariff if the call is interstate. The most common arrangement for such access is Feature Group A, an interstate line side connection offered in the tariffs of all ILECs. Feature Group B services remain available for use in the ILECs' tariffs as well, and may be useful for some providers of phone-to-phone IP telephony services. But the phone-to-phone IP telephony provider cannot obtain such access at local business rates.

The same is true for those instances where a phone-to-phone IP telephony service provider seeks to terminate service to an ILEC end user through a CLEC. These calls are not local and are not subject to the reciprocal compensation rules. Instead, they are subject to the rules regarding jointly provided switched access, and each carrier charges the phone-to-phone IP voice telephony provider for the access service that it provides.

The point is, AT&T cannot purchase local business service for origination or termination of its phone-to-phone IP telephony services under the current rules, because AT&T is providing an interstate telecommunications service and the rules quite clearly specify from which LEC

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[40] Interstate carriers' carrier charges are to be assessed upon "all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." 47 C.F.R. § 69.5(b).

tariff it must purchase its access services. AT&T may neither terminate its interstate phone-to-phone IP telephony services via local business lines, nor may it originate or terminate such calls through CLECs in a manner that allows the CLEC to take advantage of the reciprocal compensation rules applicable to exchange of local traffic. These principles are not new and do not represent suggested modifications to current rules. To the contrary, the rules in place today require that AT&T pay for its use of LEC facilities in this manner.

II. THE COMMISSION SHOULD ULTIMATELY ESTABLISH A METHOD THAT HARMONIZES THE PAYMENT FOR ALL TYPES OF INTERSTATE USE OF LOCAL EXCHANGE SWITCHING FACILITIES

While phone-to-phone IP telephony service is a telecommunications service under the Act and Commission rules, the disparity between the interstate rates paid by telephony providers and those paid by others, including information service providers, will, unless resolved, continue to provide incentives for arbitrage and other economic behavior inimical to the goals of the Act. As AT&T correctly notes in its Petition, computer-to-computer communications that use the Internet generally access local exchange facilities on the same basis as end users, even though the traffic is generally not local in nature. Disparities in the rates customers pay for identical functionalities in carriers' local exchange networks inevitably create anomalies and arbitrage opportunities that are not sustainable in the long term. There are several basic principles that apply in this proceeding, as well as to any Commission effort to harmonize the access regime as telecommunications services become increasingly reliant on more modern technology that was not envisioned at the time many of today's rules were enacted.

A. Creating a Disparity in the Access Rates Paid by Interstate Phone-to-Phone IP Telephony Providers and Other Providers of Interstate Voice Services would be Contrary to the Act and Inconsistent with the Public Interest

AT&T argues that a key reason for permitting interstate IP voice-to-voice telephony service providers to purchase access as if they were end users is that many interstate computer applications, including computer-to-computer applications that carry voice traffic, are permitted to purchase end-user access. AT&T claims that this disparity in treatment discriminates against phone-to-phone IP telephony services, which should be treated in the same manner as all other services that make use of the Internet or the IP protocol.[41] In this regard, AT&T claims that this discrimination against phone-to-phone IP telephony service is so invidious that it rises to the level of a violation of Section 202(a) of the Act, and that, accordingly, grant of its Petition is mandated as a matter of law.[42]

But the test for unreasonable discrimination under Section 202(a) of the Act is not whether the cost characteristics of a service are the same or even whether the same facilities are used. To the contrary, the test for unreasonable discrimination is based on whether the two services in question are "like" each other. This "likeness" in turn is based on whether the services in question are "functionally equivalent" to each other, and "functional equivalence is dependent on "whether the services are different in any material respect."[43] Application of this test requires the Commission to '"look to the nature of the services offered' and determine if customers perceive them as performing the same functions. . . . If 'customers regard[] the service as the same, with cost considerations being the same determining criterion,' the services are like."[44]

In this case, AT&T's argument completely ignores the service that customers universally perceive as being the functional equivalent of phone-to-phone IP telephony service -- AT&T's circuit-switched long distance service. In the case of phone-to-phone IP telephony service, the

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[41] AT&T Petition at 28-30.

[42] *Id.* at 30.

[43] *See Ad Hoc Telecommunications Users Comm. v. FCC*, 680 F.2d 790, 795 (D.C. Cir. 1982).

customer's perception of the service is the same as the customer's perception of the identical service when AT&T uses a circuit-switched protocol rather than the IP protocol for transport. Indeed, it is fair to say that few, if any, customers are even aware of the transport methodology underlying AT&T's voice long distance service. Not only are AT&T's circuit-switched voice services and its phone-to-phone IP telephony services functionally equivalent to each other, from the customer's perspective, the services are identical.

AT&T also erroneously contends that, because the physical characteristics of the access provided to originate or terminate phone-to-phone IP telephone services and computer services are often the same, Section 202(a) of the Act prohibits assessment of different charges for the use of those facilities.[45] AT&T again makes the wrong comparison. The LEC physical facilities used to originate or terminate phone-to-phone IP telephony services are identical to those used to originate or terminate AT&T's other voice telephony services. While customer perception remains the touchstone of functional equivalency for purposes of analysis of unreasonable discrimination under Section 202(a) of the Act, AT&T's argument based on facilities is predicated on mistaken facts as well as faulty law. There is no principled basis on which to distinguish the access services provided to AT&T for origination or termination of its phone-to-phone IP telephony services and its circuit switched telephony services.

In fact, the rudiments of Section 202(a) and sound public policy support retaining access parity between IP voice telephony and other voice telephony services. As customers perceive the two services to be identical, any real discrimination analysis must begin with this absolute

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[44] *MCI Telecommunications Corporation v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990) quoting *American Broadcasting Co. v. FCC*, 663 F.2d 133, 139 (D.C. Cir. 1980).

[45] AT&T Petition at 30-31.

identity. As AT&T has tried to ignore this critical comparison, its discrimination analysis must fail.

B. Encouraging Development of New Technology, as AT&T Erroneously Claims, Does Not Justify Discrimination Against Traditional Voice Telephony Services

AT&T raises the specter that assessing interstate carriers' carrier charges on phone-to-phone IP telephony providers would impede the deployment of IP technology and, potentially, "be destructive of the Internet."[46] AT&T's theory is that interstate access charges are so rife with subsidies and inefficient cost allocations that forcing phone-to-phone IP telephony providers to pay those charges would impede, if not prevent, development of IP telephony service. Implicit in AT&T's argument is the contention that IP transport for voice telephony is (or will be) the preferred technological solution for voice traffic in the future, and that the Commission should recognize and encourage this future phenomenon by granting voice traffic using this technology a preferential access price. In other words, AT&T argues that the Commission should embark on a deliberate effort to favor IP voice technology over other forms of voice technology.

Obviously, if one of two competing methods of providing the identical voice telephony service is given a substantial discount on switched access that is not available the providers using the alternative technology, providers will tend to gravitate toward the favored technology on the basis of the discriminatory discounts alone. In cases where a rational public policy choice has been made that one technology should be encouraged over another, such regulatory action could presumably have certain benefits. However, no such decision has been made at this time. Indeed, the Commission has adopted a specific policy that it will not interfere with market

[46] *Id.* at 24-25.

judgments as to which technologies ought to be preferred. This policy, known generically as "technological neutrality," is consistent with the 1996 Act as well as sound economic principles.

Under the 1996 Telecommunications Act, the Commission is directed to encourage competition on a technology and competitor-neutral basis, allowing market forces to determine the direction of technological development. In the case of advanced telecommunications, the Commission's mandate is to work towards maximum deployment "without regard to any transmission media or technology."[47] The Commission has recognized that this principle of technological neutrality applies wherever it is seeking to implement the Act's pro-competitive purposes.[48]

Any discrimination between technologies used for offering the same service not only harms the providers, but also consumers. Voice telephony service providers need, consistent with the market, to tailor their services according to realistic cost structures and customer demand. In the voice arena especially, price is a major determinant of market acceptance. In a situation where regulations artificially decreased the costs of the favored technology, providers that could not, for whatever reason, deploy the favored technology would be forced to either attempt to compete at a price disadvantage or reduce their price below a compensatory level. Both of these actions would adversely impact consumers. Perhaps worse, it is always possible that, when a regulator determines to favor a particular technological solution, the regulatory choice may be wrong. It is for this very reason that the Commission has decided to leave

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[47] Section 706(c)(1), 1996 Telecommunications Act.

[48] *See In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd. 385, 390 (1999); *In the Matters of Deployment of Wireline services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd. 20912, 20953 (1999); *In the Matter of Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776, 8801-03 (1997).

technological choices to the marketplace to the extent feasible. If the wrong technology is chosen, consumers could be deprived of the superior technology on the basis of the discriminatory regulations alone.

The market, not the Commission, should determine which technology is most compatible with the emerging competitive marketplace. AT&T has given no reason to depart from this fundamental precept of technological neutrality in its Petition. Therefore, regardless of any other finding by this Commission, the AT&T Petition must be denied and the principle reaffirmed that phone-to-phone IP telephony providers must pay for access to ILEC networks on the same basis as other providers of voice telecommunications service.

C. The AT&T Petition Demonstrates the Economic Soundness of Qwest's Proposal for a "Bill and Keep" at the Edge of the Network Model for Intercarrier Compensation

The Commission is currently examining various proposals to rationalize and improve the intercarrier compensation structure applicable to access to local exchange switching facilities by interstate telecommunications service providers.[49] Qwest has submitted comments in that docket suggesting that interstate carriers exchange traffic with each other on a "bill and keep" basis, with each carrier paying its own costs to deliver traffic to the "edge" of the other carrier's network.[50]

The AT&T Petition provides another example of how the Qwest bill-and-keep recommendation is a superior alternative to the current amalgam of access prices that mark today's access structure. Under the Qwest proposal, carriers would exchange traffic at the "edge" of each other's networks. That is, they would be responsible for transporting their traffic

[49] *See* note 3, *supra*.

[50] *See ex parte* from John W. Kure, Qwest, to William F. Caton, Acting Secretary, FCC, CC Docket No. 01-92, filed Mar. 27, 2001.

to the edge of the terminating carrier's network, and would recover their costs from their own customers.

In a bill-and-keep environment, the incentive to seek to arbitrage the system through artificial service configurations and classifications would be removed. AT&T would not have the incentive to seek to classify its phone-to-phone IP telephony service as anything other than what it truly is -- a telecommunications service -- because there would be no economic benefit to be derived from accepting AT&T's proposed classification. That is one of the key components of the Qwest bill-and-keep proposal for intercarrier compensation -- it is consistent and rational without regard to arbitrary regulatory classifications. Adoption of the Qwest bill-and-keep proposal for intercarrier compensation would essentially resolve the issues raised by AT&T in its Petition.

III. A DECLARATORY RULING IS NOT AN APPROPRIATE FORUM TO OVERHAUL THE COMMISSION'S RULES

To make the determination requested by AT&T -- that phone-to-phone IP telephony services are not telecommunications services subject to carriers' carrier charges -- requires far more than a declaratory ruling by the Commission. Exempting phone-to-phone telephony with an IP component from access charges would require the Commission to establish a specific exception from the definition of telecommunications service, because strict application of the rules currently classifies phone-to-phone IP telephony as a telecommunications service.

A declaratory ruling is not a proper vehicle to create wholesale an entirely new regulatory structure.[51] A declaratory ruling under Section 1.2 of the Commission's rules is appropriate only

[51] 5 U.S.C. § 554(e); 47 C.F.R. § 1.2.

when the facts of the case are clearly developed and essentially undisputed.[52] Here the factual premise of the AT&T Petition is neither clearly developed nor undisputed. Using a declaratory ruling to come to the result requested in AT&T's Petition would not give the Commission the type of record it needs to justify overhauling the existing regulatory classifications. The Intercarrier Compensation proceeding gives the Commission precisely the opportunity it needs to compile such a record. A declaratory ruling proceeding does not.

In other words, any effort by the Commission to find that phone-to-phone IP telephony is not a telecommunications service, but an information service would require re-writing the definitions of telecommunications services and information services. The Commission should, therefore, reject AT&T's attempt to overhaul existing regulation through this declaratory ruling process. Even if the AT&T Petition had some merit, which it does not, a declaratory ruling would not be appropriate.

CONCLUSION

Accordingly, Qwest requests that the Commission grant AT&T's Petition for Declaratory Ruling in part, and deny the Petition in part. Specifically, Qwest urges the Commission to:

1. Deny AT&T's Petition for a Declaratory Ruling that would defy the existing rules, which clearly classify phone-to-phone telephony with an IP component as a telecommunications service; and

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[52] *See In the Matter of American Network, Inc. Petition for Declaratory Ruling Concerning Backbilling of Access Charges, Memorandum Opinion and Order*, 4 FCC Rcd. 550, 551 ¶ 18 (1989). The Commission can seek to supplement a declaratory ruling record through discovery, but a declaratory ruling proceeding is not a proper procedural vehicle for resolving contested factual issues.

2. Conclude for AT&T that application of the Commission's rules require providers of phone-to-phone telephony services, including those with an IP component, to pay access charges to LECs.

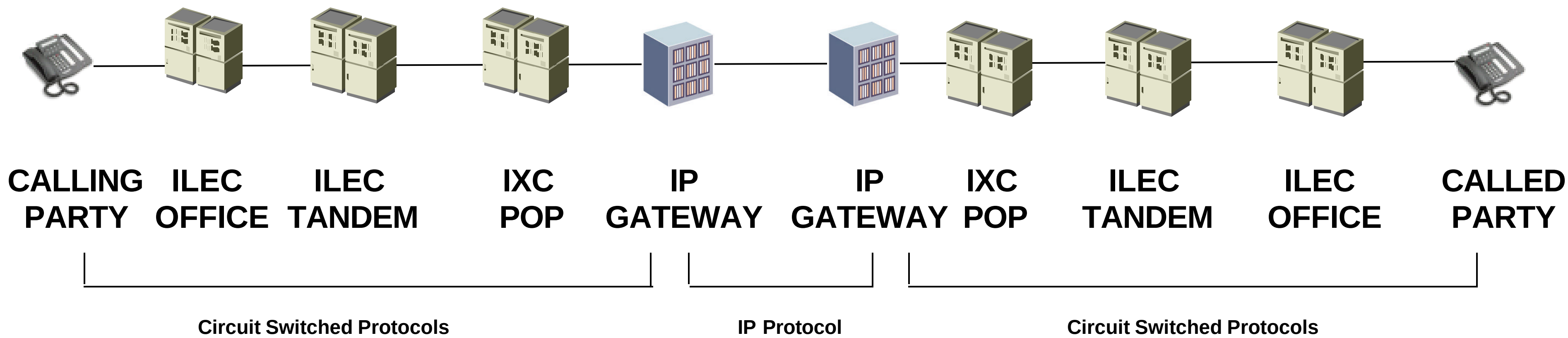
Respectfully submitted,

Kristin L. Smith
Sharon J. Devine
Robert B. McKenna
Kristin L. Smith
QWEST COMMUNICATIONS
INTERNATIONAL INC.
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
303.672.2820

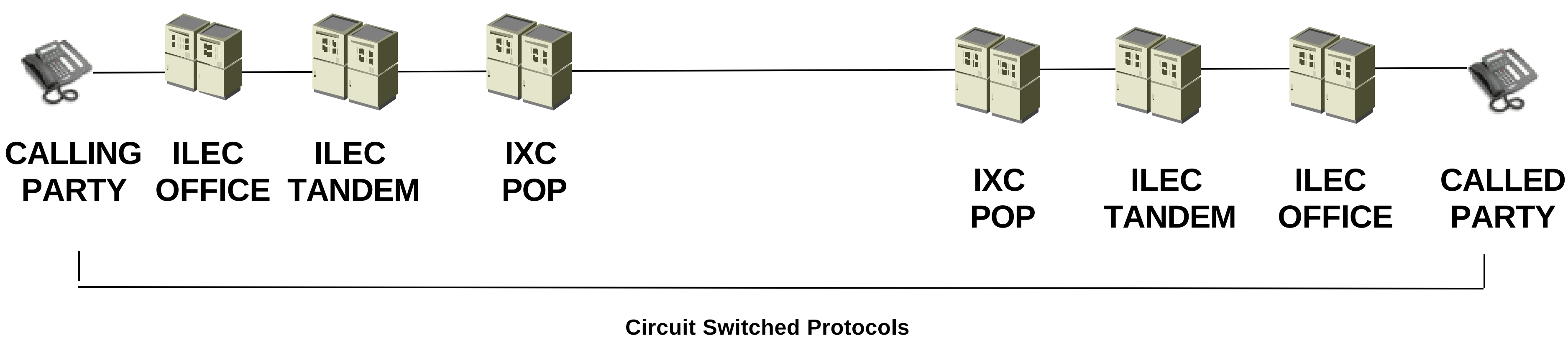
December 18, 2002

Qwest - Exhibit A

Comparing Phone-To-Phone IP Telephony Calls



to Traditional Circuit-Switched Calls



CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST CORPORATION** to be 1) filed with the Secretary of the FCC via the FCC's Electronic Comment Filing System; 2) a copy to be served via hand delivery on each of the FCC staff persons marked with an asterisk (*) on the attached service list; 3) a copy to be served via e-mail on the FCC's copy contractor Qualex International; and 4) a copy to be served, via First Class United States Mail, postage prepaid, on all other parties listed on the attached service list.

Richard Grozier
Richard Grozier

December 18, 2002

*Michelle Carey
Chief, Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

*Tamara Preiss
Chief, Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Qualex International
qualexint@aol.com

Mark C. Rosenblum
Lawrence J. Lafaro
Judy Sello
AT&T Corp.
Room 3A229
900 Route 202/206 North
Bedminster, NJ 07921

David L. Lawson
Julie M. Zampa
Sidley Austin Brown & Wood, LLP
Counsel for AT&T
1501 K Street, N.W.
Washington, DC 20005

David W. Carpenter
Sidley Austin Brown & Wood, LLP
Counsel for AT&T
Bank One Plaza
10 S. Dearborn
Chicago, IL 60603

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